

Below is a Memorandum Decision of the Court.



Karen A. Overstreet
Karen A. Overstreet
U.S. Bankruptcy Court Judge
(Dated as of Entered on Docket date above)

9 Karen A. Overstreet
10 Bankruptcy Judge
11 United States Courthouse
12 700 Stewart Street, Suite 6301
Seattle, WA 98101
206-370-5330

13 IN THE UNITED STATES BANKRUPTCY COURT FOR THE
14 WESTERN DISTRICT OF WASHINGTON AT SEATTLE

15 In re

16 Case No. 10-23914

17 Peter James Meyer and
18 Sharee Lynn Meyer,

19 Debtor(s).

20 Peter James Meyer and
21 Sharee Lynn Meyer,

22 Plaintiffs,

23 Adv. No. 12-01630

24 v.

25 U.S. BANK N.A, as Trustee for Structured
Asset Securities Corporation Mortgage
Pass-Through Certificates, 2006-GEL2, a
National Bank; AMERICA'S SERVICING
COMPANY, a division of Wells Fargo
Bank N.A. dba Wells Fargo Home
Mortgage, a National Bank; WELL
FARGO BANK NA, a National Bank;
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., a

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MEMORANDUM DECISION

1 Delaware Corporation; and NORTHWEST
2 TRUSTEE SERVICES, INC., a
3 Washington Corporation,
4 Defendants.

5 The trial of this matter commenced on October 8, 2013 and concluded on November 5,
6 2013. The Court has considered the evidence presented at trial, the records and files in the case,
7 and the parties' post trial submissions. This Memorandum Decision contains the Court's
8 findings of fact and conclusions of law for purposes of Bankruptcy Rule 7052.¹
9

10 **I. BACKGROUND**

11 Plaintiffs, Peter and Sharee Meyer, commenced this action against Northwest Trustee
12 Services Inc. ("NWTS") and other defendants, asserting various causes of action against the
13 defendants related to foreclosure proceedings against their home located at 12412 – 84th St. S.E.,
14 Snohomish, WA (the "Residence"). After summary judgment proceedings, the Meyers' claims
15 remaining for trial included violation of the Washington State Deeds of Trust Act, RCW 61.24 et
16 seq. (the "DOTA"), the Washington State Consumer Protection Act, RCW 19.86 et seq. (the
17 "WACPA"), and the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p (the
18 "FDCPA"). By the time of trial, all of the defendants had been dismissed from the case except
19 NWTS, so the case proceeded to trial on these claims only against NWTS.
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21

22 **II. FACTS**

23
24 On November 10, 2005, the Meyers executed a promissory note in favor of Finance
25 America LLC. (the "Note"). Ex. P-1. To secure payment of the Note, they executed a Deed of
26

27 ¹ Unless otherwise indicated, all Code, Chapter, Section and Rule references are to the Bankruptcy Code, 11 U.S.C.
28 §§101 et seq. and to the Federal Rules of Bankruptcy Procedure, Rules 1001 et seq.

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1 Trust on the same date (the “Deed of Trust”) against their Residence. Ocwen Loan Servicing
2 was identified as the servicer in the Deed of Trust, although the Deed of Trust provides both that
3 the servicer might change and that the Note can be transferred. *See* Ex. P-2. The Deed of Trust
4 named DCBL, Inc. as trustee, Finance America LLC as lender, and Mortgage Electronic
5 Registration Systems (“MERS”) as nominee of the lender and beneficiary under the Deed of
6 Trust. The Deed of Trust was recorded on November 18, 2005. *Id.* The Meyers moved into the
7 Residence with their three children and began making their payments under the Note in January
8 of 2006.

10
11 **A. The Transfer of the Loan.**

12 Unbeknownst to the Meyers, after the closing of their loan transaction, the Note was
13 transferred into a so-called securitized trust. When and to whom the Note was transferred was
14 highly contested at the trial. After reviewing all of the evidence and testimony, the Court is
15 persuaded that in or around April of 2006, the Meyers’ loan became part of a securitized trust
16 entitled Structured Asset Securities Corporation Mortgage Pass-Through Certificates Series
17 2006-GEL2 (“GEL2”). At some point prior to April 1, 2006, the Note was indorsed in blank via
18 a separate Allonge, which is undated (the “Allonge”), but which is signed by a Loan
19 Administration Supervisor for Finance America. *See* Ex. D-1. Although the path of the Note
20 into GEL2 is not clear, the Court finds it more probable than not that possession of the Note,
21 after its indorsement in blank, was first obtained by Lehman Brothers Holdings, Inc. (“Lehman”)
22 and then deposited by Lehman into GEL2 pursuant to the terms of a Trust Agreement dated
23 April 1, 2006 (the “Trust Agreement”), among Structured Asset Securities Corp, as Depositor,
24 Aurora Loan Services LLC, as Master Servicer, Clayton Fixed Income Services, Inc., as Credit
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1 Risk Manager, and U.S. Bank National Association, as Trustee (“U.S. Bank”). The Deed of
2 Trust has never been assigned by Finance America.

3 According to the Trust Agreement, Lehman acquired various loans, sold them to
4 Structured Asset Securities Corp., which in turn “deposited” the loans into GEL2. Ex. D-3, pp.
5 1, 46. Under the Trust Agreement, individual investors could acquire differing types of interests
6 in GEL2 by purchasing the certificates described in the Trust Agreement.
7
8

9 John Richards, a vice president of U.S. Bank, testified concerning the Trust Agreement.
10 According to his testimony, GEL2, as a trust, is not an operating entity. It has no employees, no
11 office, and acts solely through its trustee, U.S. Bank. According to Mr. Richards, U.S. Bank’s
12 duties as trustee were primarily to address the needs of the investor certificate holders, with the
13 Trust Agreement placing responsibility for the management of the loans with one or more
14 servicers. Under the Trust Agreement, U.S. Bank also stands as the title holder of the loans, by
15 its possession of the loan notes or possession through one or more custodians.
16
17

18 By separate agreement, Wells Fargo Bank, N.A. (“Wells Fargo”) acted as an independent
19 contractor and servicer of the loans which were part of GEL2 for the “seller,” defined under the
20 agreement as “Lehman Brothers Holdings Inc. or its successor in interest or assigns.” Ex. D-4,
21 Securitization Subservicing Agreement, dated April 1, 2006 (the “Servicing Agreement”), Art. 1,
22 Art. III §§ 3.01. U.S. Bank is not a party to that agreement, and only acknowledged it as the
23 trustee. *Id.* Mr. Richards testified that Wells Fargo also acted as a custodian for GEL2. Under
24 the Servicing Agreement, Wells Fargo was to maintain possession of loan files on behalf of U.S.
25 Bank, as trustee for GEL2. Ex. D-4, p. 13. Under the Trust Agreement, U.S. Bank was
26 authorized to execute powers of attorney in favor of any servicer to permit the servicer to
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1 foreclose against any mortgaged property in GEL2 [Ex. D-3, p. 123], but all actions in pursuit of
2 foreclosure were delegated to the servicer under the Servicing Agreement. Brock Wiggins, a
3 vice president for loan documentation for Wells Fargo, identified three separate Limited Power
4 of Attorney documents, each executed by U.S. Bank and recorded in Snohomish County in 2007,
5 pursuant to which he testified Wells Fargo acted as attorney-in-fact for U.S. Bank under the
6 Servicing Agreement. Ex. D-6, D-7, D-8.

8 The Meyers sought to show at trial that their loan was not part of GEL2 and that neither
9 GEL2 nor U.S. Bank had possession of the Note. NWTS submitted a redacted schedule of loans,
10 which included the Meyers' loan, and which Brock Wiggins testified was the schedule of loans
11 which were part of GEL2 and being serviced by Wells Fargo under the Servicing Agreement.
12 Ex. D-5. The Court ordered an *in camera* submission of an unredacted version of the schedule
13 of loans, and the Court verified that the Meyers' loan was referenced on line 858 of the schedule
14 of loans. *See* Declaration of Brock Wiggins, Dkt. 136. A column in that spreadsheet states that
15 information concerning the Meyer loan was shown as of April 1, 2006, indicating that the loan
16 had become part of GEL2 on or before that date. Mr. Wiggins testified that according to Wells
17 Fargo's records, Wells Fargo took possession of the Note and the Allonge on March 1, 2006, and
18 that those documents and the other documents related to the Meyer loan had been maintained
19 initially in Wells Fargo's document vault in San Bernadino, but subsequently moved to Wells
20 Fargo's vault in Minnesota. Ex. P-13. The original Note, which Mr. Wiggins testified had been
21 in Wells Fargo's continuous possession pursuant to the terms of the Servicing Agreement, was
22 produced at trial for the Court's examination. Based upon the evidence, the Court concludes that
23 the holder of the Note is Wells Fargo, as custodian for U.S. Bank, as trustee for GEL2.

1 **B. Foreclosure.**

2 The Meyers continued to make their payments under the Note until they started to
3 experience financial problems toward the end of 2008. It is not clear from the evidence when
4 the Meyers initially defaulted in their payments under the Note. There is no evidence that any
5 lender ever issued a formal notice of default.¹ On March 9, 2009, NWTS received its first
6 referral to foreclose the Deed of Trust, which referral was in the form of a Case Information
7 Report (the “2009 CIR”) that NWTS pulled from a third party website called Vendorscape. Ex.
8
9 D-9.

11 Jeff Stenman, the Foreclosure Manager and Director of Operations for NWTS, testified
12 that NWTS has used Vendorscape to access foreclosure assignments for 10 years. NWTS has no
13 procedures to verify the accuracy of the information contained in Vendorscape, even though Mr.
14 Stenman admitted that he does not know how the information is generated within Vendorscape
15 or who prepares it. He described Vendorscape as a secure website which NWTS can access
16 using a password. If a NWTS employee has any question about the foreclosure process or any
17 documentation, they may leave a message in Vendorscape and await a response. Mr. Stenman
18 affirmed that NWTS employees do not contact servicers or lenders in any other way, and are
19 instead trained to rely on the information provided through Vendorscape.

22 Consistent with NWTS's customary practice, it used the information from Vendorscape
23 and the 2009 CIR, without any verification, to initiate the foreclosure against the Meyers'
24 Residence. The 2009 CIR is a table collection of data and does not contain any instructions. The
25 2009 CIR lists the Meyers as the obligors under the Note, it includes the Residence address and
26
27

28 ¹ Mr. Richards testified that it was the servicer's responsibility under the Servicing Agreement to declare a default
under a loan which was part of GEL2, and not the duty of U.S. Bank as trustee.

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1 the Meyers' social security numbers, and it shows U.S. Bank as the trustee for GEL2 as the
2 "beneficiary." The report mistakenly lists the interest rate on the Note as not being adjustable,
3 when in fact it was adjustable. The interest rate is listed as 9.6050% with the last payment made
4 on September 1, 2008. Mr. Stenman testified that he assumed the information in this report
5 came from America's Servicing Company ("ASC"), which is listed in the report as the servicer,
6 and he testified that he thought (but did not say for sure) that ASC was a division of Wells Fargo.
7

8 Based upon the information in the 2009 CIR, Mr. Stenman executed an Assignment of
9 Deed of Trust from MERS to "U.S. Bank National Association as Trustee for Structured Asset
10 Securities Corporation Mortgage Pass-Through Certificates 2006 GEL2, as beneficiary" on
11 March 10, 2009, the day after receiving the referral. Ex. P-3. Although Mr. Stenman was an
12 employee of NWTS, he prepared and signed the assignment as a Vice President of MERS
13 pursuant to what he described as a tri-party agreement between himself, Wells Fargo and MERS.
14 Although NWTS repeatedly relied at trial on the authority of this so-called tri-party agreement,
15 the agreement was never produced in evidence. The Assignment of Deed of Trust was recorded
16 on July 1, 2009.
17

18 On March 26, 2009, Anne Neely signed an appointment of successor trustee, appointing
19 NWTS as successor trustee. *See* Ex. P-4. Ms. Neely is identified in the document as a vice
20 president of loan "doc" Wells Fargo, acting as attorney-in-fact for U.S. Bank, trustee for
21 Structured Asset Securities Corporation Mortgage Pass-Through Certificates 2006 GEL2. The
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1 appointment of successor trustee was recorded July 1, 2009. It incorrectly refers to MERS as the
2 beneficiary.²

3 For reasons that were not disclosed during the trial, the 2009 foreclosure proceeding
4 against the Meyers was discontinued and a new proceeding started in 2010. The 2010
5 foreclosure was based upon a case information report which NWTS accessed in Vendorscape on
6 June 23, 2010 (the “2010 CIR”). Ex. P-15. With the report was a separate set of instructions
7 with an express request to commence foreclosure, but it is not clear from whom those
8 instructions originated. Ex. P-16. The 2010 CIR carried over the incorrect reference to the Note
9 as not adjustable, it showed a lower principal balance than the 2009 CIR, and a higher interest
10 rate of 9.6250%. It also showed the last payment made on February 1, 2009.

11
12
13 Heather Smith of NWTS prepared the Notice of Default dated July 9, 2010 (the “Notice
14 of Default”) based on the information contained in the 2010 CIR. Ex. P-5. At the time, Ms.
15 Smith was a foreclosure assistant with NWTS. Paragraph (K) of the Notice of Default provides:
16
17

18 K) Contact Information for Beneficiary (Note Owner) and Loan
19 Servicer

20 The beneficiary of the deed of trust is US Bank National
21 Association, as Trustee for Structured Asset Securities
22 Corporation Mortgage Pass-Through Certificates, 2006-GEL2,
23 whose address and telephone number are:
24
25

26
27 c/o America’s Servicing Company
28 MAC X7801-02T, 3476 Stateview Blvd
Fort Mill, SC 29715
855-248-5719

² On March 10, 2009, Mr. Stenman had assigned MERS’ interest in the Deed of Trust to U.S. Bank.

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1 The loan servicer for this loan is America's Servicing Company,
2 whose address and telephone number are:
3
4 MAC X7801-02T
5 3476 Stateview Blvd
6 Fort Mill, SC 29715
7 800-662-5014
8
9

10 In paragraph L of the notice, under "Notice pursuant to the Federal Fair Debt Collection
11 Practices Act" it states "[t]he creditor to whom the debt is owed [sic] US Bank National
12 Association, as Trustee for Structured Asset Securities Corporation Mortgage Pass-Through
13 Certificates 2006-GEL2/America's Servicing Company." The Notice of Default incorrectly
14 referred to NWTS as the "authorized agent" for U.S. Bank. As of the date of the notice, there is
15 no evidence that NWTS was an authorized agent for any of Wells Fargo, U.S. Bank, or GEL2;
16 instead, by that time NWTS was already the trustee under the Deed of Trust with statutory duties
17 to the Meyers. The Notice of Default also states "[t]he beneficiary declares you in default for
18 failing to make payments as required by your note and deed of trust." *Id.*, ¶ C. However, there
19 is no evidence that GEL2, U.S. Bank, or Wells Fargo/ASC ever formally declared the Meyers in
20 default and no evidence that NWTS was the beneficiary or was authorized to declare such a
21 default.
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24 In connection with the preparation of the Notice of Default, NWTS received a
25 Foreclosure Loss Mitigation Form declaration (the "Loss Mitigation Form") and a Beneficiary
26 Declaration (the "Beneficiary Declaration") as required by RCW 61.24, each dated June 24,
27 2010. The Loss Mitigation Form was signed under penalty of perjury by John Kennerty, "VP of
28 Loan Documentation" for ASC. *See* Ex- P-5. The declaration states that "[t]he Beneficiary or
Beneficiary's authorized agent has contacted the borrower under, and has complied with, Section
2 of Chapter 292, Laws of 2009 (contact provision to 'assess the borrower's financial ability to

Below is a Memorandum Decision of the Court.

1 pay the debt secured by the deed of trust, and explore options for the borrower to avoid
2 foreclosure’).” There is no evidence that any employee or representative of ASC, U.S. Bank, or
3 GEL2 contacted the Meyers before the foreclosure was commenced. Mr. Kennerty also signed
4 the Beneficiary Declaration, signing that document as a “VP Loan Documentation” for Wells
5 Fargo as attorney-in-fact for US Bank. *See also*, Exhibit D6, 7 and 8, Limited Power of
6 Attorney. The Beneficiary Declaration, which is also under penalty of perjury, states that U.S.
7 Bank, as trustee for GEL2, was the holder of the Note. Ex. P-5. Mr. Kennerty testified at a
8 deposition that he routinely signed documents of this type despite the fact that he had no personal
9 knowledge of any of the factual statements therein, but that he merely received these forms from
10 other departments at Wells Fargo and signed them. Ex. P-17, pp. 59-67.³
11

12
13 No one at NWTS took any action to verify any of the information used in the Notice of
14 Default or referenced in the Loss Mitigation Form or Beneficiary Declaration. The information
15 in the Notice of Default was merely pulled mechanically from the 2010 CIR. Ms. Smith testified
16 that she had been trained not to make any inquiries concerning these documents, but instead to
17 rely on them. In fact, when asked repeatedly by counsel for the Meyers whether she had verified
18 information she received, her consistent response was “I have been trained to rely on the referral
19 information in Vendorscape” or “I have been trained to rely on the Beneficiary Declaration.” As
20 to Mr. Kennerty's authority, Ms. Smith testified that she knew he worked for Wells Fargo and/or
21 ASC. She further testified that in her experience, Wells Fargo routinely executed documents for
22 U.S. Bank.
23
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26
27 ³ Mr. Kennerty's deposition was taken in the case of *Geline v. NWTS* on May 20, 2010, so it would be directly
28 relevant to the procedures used by him at or around the time the Meyers' home foreclosure was commenced. Over
the objection of NWTS, the Court admitted Mr. Kennerty's deposition pursuant to Rules 804(a)(5)(A) and 804(b)(1),
and gave NWTS the opportunity to object to particular parts of the deposition. NWTS raised no objections to any
part of the deposition.

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1 The Meyers found the Notice of Default taped to the door of their Residence. They were
2 not familiar with any of the entities identified in the notice except for ASC, to which they had
3 been making mortgage payments. The notice stated that in order to avoid foreclosure, the
4 Meyers would have to pay \$82,035.65. When Mr. Meyer called the phone number for ASC
5 listed in the notice, the individual who answered the phone identified themselves as an employee
6 of Wells Fargo. No one explained to him what the relationship was between these two entities.
7
8 When he contacted NWTS, he was referred to “a local law firm.”

9
10 Mr. Meyer did not agree with the information contained in the notice. He believed that
11 the arrears listed were incorrect because he believed the interest rate listed in the Notice of
12 Default of 9.6% was incorrect. He contended that their monthly payment was only \$3200,
13 whereas the payment shown in the Notice of default was \$4,066.50. The Meyers did not believe
14 they owed any money to U.S. Bank or GEL2. Mr. Meyer attempted to contact Wells Fargo,
15 ASC and NWTS with his concerns, but was unable to resolve the issues. Mr. Meyer also
16 attempted to locate Finance America, the original lender.

18
19 On August 13, 2010, NWTS executed a notice of trustee’s sale (the “Notice of Trustee’s
20 Sale”). Ex. P-6. The notice recited that the Residence would be sold on the steps of the
21 Snohomish County Courthouse on November 19, 2010, unless the Meyers paid \$82,431.77 by
22 November 8, 2010. Ms. Smith signed the Notice of Trustee’s Sale for NWTS.

24 **C. The Bankruptcy Proceedings.**

26 Failing to resolve the situation on their own, the Meyers hired attorney Richard Jones to
27 represent them in July of 2010. *See* Standard Retainer Agreement attached to the Declaration of

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1 Richard L. Jones, Case No. 10-23914, Dkt. 51.⁴ The Meyers also retained attorney Larry
2 Feinstein to assist them with the filing of a chapter 13 bankruptcy proceeding on November 18,
3 2010, the day before the scheduled trustee's sale of their Residence. Mr. Meyer testified that but
4 for the foreclosure, he would not have filed bankruptcy and that the sole reason for the filing was
5 to find a way to save their home from foreclosure.
6

7 Through Mr. Jones, by letter dated December 17, 2010, the Meyers issued a Qualified
8 Written Request under the Truth in Lending Act, directed at ASC, in order to determine the
9 holder and owner of the Note. Ex. P-7. ASC sent a response to Mr. Feinstein on January 12,
10 2011. Ex. P-14. The letter advised that the Meyers' loan was in a "pool of loans" managed by
11 U.S. Bank, but it provided no detailed information about how or when that had occurred, or even
12 the name of the fund. The letter did, however, contain a contact address for U.S. Bank.
13

14
15 On December 21, 2010, U.S. Bank, as trustee for GEL2, filed a proof of claim in the
16 Meyers' bankruptcy proceeding listing a total amount due under the Deed of Trust as
17 \$502,190.76. In the proof of claim, unpaid interest is calculated at the rate of 9.625% (the rate
18 shown in the 2010 CIR) from January 1, 2009. The claim shows a payment amount of \$4,066.50
19 per month for the period February 1, 2009, to June 2009, but then reduced payments of
20 \$3,448.30 per month as of December 1, 2010. The Meyers' first proposed chapter 13 plan
21 provided only for payments of \$2,000 per month on their mortgage; their plan stated that they
22 were working on a loan modification with the lender. Case No. 10-23914, Dkt. 6. U.S. Bank
23 opposed confirmation of the plan on the grounds that it did not provide for payment of the
24 current mortgage payment of \$3,448.30 per month or provide for the cure of the prepetition
25 arrears totaling \$86,020.02. *Id.*, Dkt. 19.
26
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28 ⁴ The Court may take judicial notice of its pleadings and files. Fed.R.Evid. 201.

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1 The Meyers and U.S. Bank were unable to resolve their disputes over plan confirmation.

2 On June 1, 2011, the Meyers stipulated that U.S. Bank could have relief from the automatic stay
3 effective June 22, 2011. Case No. 10-23914, Dkt. 30. They removed their home mortgage from
4 their plan and their plan was confirmed on August 19, 2011. *Id.*, Dkt. 40.

5
6 On June 29, 2011, NWTS restarted the foreclosure process with the issuance of an
7 Amended Notice of Trustee's Sale with a sale date of August 12, 2011. Ex. P-8. Despite
8 having agreed in the bankruptcy case to relief from stay, the Meyers then commenced this
9 adversary proceeding on July 23, 2012, and sought a temporary restraining order enjoining the
10 scheduled foreclosure sale. U.S. Bank did not appear at the hearing on August 1, 2012, nor did it
11 file any opposition to the entry of the temporary restraining order. Heidi Buck appeared for
12 NWTS at the hearing as NWTS was also a named defendant in the action. On August 2, 2012, a
13 temporary restraining order was entered, which required the Meyers to deposit \$3,616.03 into the
14 Registry of the Court by August 6, 2012, pursuant to RCW 61.24.130. A hearing on the entry of
15 a preliminary injunction was scheduled for August 10, 2012. U.S. Bank and ASC, through the
16 same counsel, filed a joint non-opposition to the request for a preliminary injunction, provided
17 the Meyers would continue to make monthly payments of \$3,616.03 pursuant to the terms of the
18 temporary restraining order. Dkt. 19. The non-opposition recited that the parties had engaged in
19 three failed mediation attempts. This Court entered the preliminary injunction on August 20,
20 2012, requiring the Meyers to continue to make monthly payments into the Registry of the Court.
21
22 Dkt. 22.

23
24 Multiple motions were filed in this case, including various discovery motions. On March
25 29, 2013, U.S. Bank and MERS filed a motion to compel the Meyers' responses to
26 interrogatories and request for production of documents. The Meyers responded and at a hearing
27
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1 on April 19, 2013, the Court gave the Meyers until April 30, 2013 to fully respond to the
2 discovery requests. In addition, the Court awarded discovery sanctions of \$1,200 to U.S. Bank
3 and MERS. *See Order at Dkt. 76.* U.S. Bank and Wells Fargo then moved on May 17, 2013 to
4 dissolve the preliminary injunction entered by the Court on the ground that the Meyers had failed
5 to make the monthly payments into the court registry since September 10, 2012. These
6 defendants also filed their second motion to compel discovery responses from the Meyers,
7 complaining that the Meyers had failed to comply with the Court's prior order to compel. The
8 Meyers did not respond to either motion, and on June 5, 2013, the Court entered orders granting
9 the defendants' motion to dissolve the preliminary injunction (Dkt. 90), and dismissing all claims
10 against U.S. Bank and MERS as a discovery sanction (Dkt. 91). The motion to dissolve the
11 injunction also sought an order allowing the trustee's sale to be reset. On June 13, 2013, the
12 Court entered an order providing that the trustee's sale could be reset pursuant to applicable non-
13 bankruptcy law. As of the date of trial, however, the Meyers' Residence had not been sold at
14 trustee's sale.

17
18 The Meyers contend that NWTS violated its duties as a foreclosure trustee under
19 Washington state law. They contend that they have been damaged as a consequence of NWTS's
20 unlawful acts by having to (1) hire Mr. Jones to issue a Qualified Written Request to determine
21 the name and contact information for the holder and owner of their loan, (2) file a bankruptcy
22 proceeding in order to stop what they believed was an unlawful foreclosure action against their
23 Residence, (3) incur attorney's fees in connection with the foreclosure and the bankruptcy, and
24 (4) incur expenses moving to a rental house to avoid the uncertainty associated with the multiple
25 notices of trustee's sale.

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1 Between the time the Meyers hired Mr. Jones and the time ASC responded to their
2 Qualified Written request, Mr. Jones incurred fees of \$980. Case No. 10-23914, Dkt. 54, p. 3.
3 Mr. Feinstein charged the Meyers \$3,500 for the filing and preparation of their bankruptcy case,
4 and the Meyers paid the bankruptcy filing fee of \$274.

5
6 Mr. and Mrs. Meyer also testified to the emotional effects of the foreclosure proceedings
7 on them. Mr. Meyer described it as "four years of hardship." Although he took full
8 responsibility for his financial problems and default in payments under the Note, he testified that
9 the stress of foreclosure and the attempts to get back on track with his mortgage resulted in
10 severe stress affecting his work, his marriage, and his parenting, for which he ultimately sought
11 professional help. Given the stress, he and his wife made the decision to move into a rental
12 house in July of 2013. Their monthly rent under the lease is \$2,595, which they had paid from
13 July through October as of the time of trial (\$10,380).⁵ The Meyers were also required to pay a
14 security deposit of \$2,245 and a pet deposit of \$300. In addition, Mr. Meyer testified to moving
15 expenses incurred of \$2,625, which included the time that he and his wife were off work in order
16 to handle the move themselves. Mr. Meyer also calculated his and his wife's time off from work
17 in order to attend multiple mediations and hearings, which he estimated cost him \$3,200 in total,
18 including travel expenses. Their damages, according to the evidence, amount to \$23,504. Mr.
19 Meyer testified that he has also incurred attorney's fees and costs in this litigation.

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21
22
23 **III. JURISDICTION**
24

25 The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and
26 this is a core proceeding under 28 U.S.C. § 157(b)(2)(B),(K).

27
28 ⁵ The Meyers were required to pay \$3,616.03 into the registry of the court pursuant to the Court's preliminary injunction, thus the move reduced their monthly housing expense by just over \$1,000.

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2 **IV. DISCUSSION**

3 **A. Violation of the Washington Deeds of Trust Act.**

4 Washington permits the foreclosure of deeds of trust nonjudicially under the DOTA. The
5 statute offers a convenient and relatively inexpensive method for foreclosing deeds of trust,
6 provided the lender complies with the terms of the statute.

7 Washington's deed of trust act should be construed to further three
8 basic objectives. *See Comment, Court Actions Contesting the*
9 *Nonjudicial Foreclosure of Deeds of Trust in Washington*, 59
10 *Wash.L.Rev.* 323, 330 (1984). First, the nonjudicial foreclosure
11 process should remain efficient and inexpensive. *Peoples Nat'l*
12 *Bank v. Ostrander*, 6 Wash.App. 28, 491 P.2d 1058 (1971).
13 Second, the process should provide an adequate opportunity for
14 interested parties to prevent wrongful foreclosure. Third, the
15 process should promote the stability of land titles.

16 *Cox v. Helenius*, 103 Wash.2d 383, 387, 693 P.2d 683 (1985).

17 **1. The Changing Legal Landscape of the DOTA.**

18 The Meyers contend that NWTS violated the DOTA by commencing a foreclosure
19 against their Residence without the proper authority under Washington State law and that NWTS
20 failed to comply with its duties to them as trustee under RCW 61.24.010(3).

21 As is typical in a number of similar cases asserting claims under the DOTA, NWTS
22 argues that because the Residence has not been sold, the Meyers cannot, as a matter of law,
23 establish damages. As is also typical in these cases, NWTS argues that in Washington, there is
24 no cause of action for wrongful initiation of foreclosure. Federal judges in the Western District
25 of Washington addressing these issues have generally followed the case of *Vawter v. Quality*
26 *Loan Service Corp.*, 707 F.Supp.2d 1115, 1123 (W.D. Wash. 2010). In that case, addressing a
27 motion to dismiss by the lender and MERS, the court held that under Washington state law "the
28 DTA does not authorize a cause of action for damages for the wrongful initiation of nonjudicial

Below is a Memorandum Decision of the Court.

1 foreclosure proceedings where no trustee's sale occurs." However, recent state court cases have
2 undermined the validity of this statement of the law. In *Walker v. Quality Loan Service Corp.*,
3 176 Wash.App. 294, 308 P.3d 716 (Wash.Ct.App. 2013), the Washington State Court of Appeals
4 stated its disagreement with the holding in *Vawter*, concluding that *Vawter* relied on cases which
5 were decided before the legislature enacted the current version of RCW 61.24.127 and before the
6 Washington Supreme Court decided *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wash. 2d
7 83, 10, 285 P.3d 34 (2012). The court in *Walker* held:

9 Because the legislature recognized a presale cause of action for damages
10 in RCW 61.24.127(1)(c), we hold that a borrower has an actionable claim
11 against a trustee who, by acting without lawful authority or in material
12 violation of the DTA, injures the borrower, even if no foreclosure sale
13 occurred. Additionally, where a beneficiary, lawful or otherwise, so
14 controls the trustee so as to make the trustee a mere agent of the
15 beneficiary, then, as principal, it may have vicarious liability."

16 176 Wash.App. at 313. *See also Bavand v. OneWest Bank, F.S.B.*, 176 Wash.App. 475, 309 P.3d
17 636 (Wash.Ct.App. 2013)(rejecting *Vawter*).

18 NWTS urges the Court to decline to follow *Walker*, arguing that as an intermediate
19 appellate decision, it is not binding on this Court, and further, that the question addressed by
20 *Walker* was certified to the Washington Supreme Court for review by District Judge Marsha
21 Pechman in *Frias v. Asset Foreclosures Services, Inc.*, Case no. C13-760-MJP, by order entered
22 September 25, 2013. In addition, NWTS offers the additional authority from the Ninth Circuit
23 Bankruptcy Appellate Panel, *Brown v. Bank of America, et al.*, BAP No. WW-12-1534, in which
24 the panel followed *Vawter*, without any citation to *Walker* or *Bavand*.

25 As far as this Court is concerned, the Washington courts have spoken: *Walker* and
26 *Bavand* reject the holding in *Vawter* that there is no cause of action for violation of the DOTA.
27 Bankruptcy courts routinely follow state courts when addressing legal issues under state law,
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Below is a Memorandum Decision of the Court.

1 particularly with respect to questions involving real property. *Butner v. U.S.*, 440 U.S. 48, 99
2 S.Ct. 914 (1979). In following state court cases, this Court has never distinguished between state
3 appellate and supreme court cases. Moreover, the Court finds the *Walker* case particularly
4 thoughtful and on point. Following *Walker*, the Court must determine whether the Meyers
5 proved that NWTS violated some provision of the DOTA.

6 **2. NWTS's Duties Under the DOTA.**

7 In 2008, the legislature amended the DOTA to provide that a trustee has no fiduciary duty
8 to either the lender or the homeowner in a foreclosure action. Specifically, subsections (3) and
9 (4) were added to RCW 61.24.010, and they provide:

10 (3) The trustee or successor trustee shall have *no fiduciary duty* or fiduciary
11 obligation to the grantor or other persons having an interest in the property
12 subject to the deed of trust.
13 (4) The trustee or successor trustee shall *act impartially* between the
14 borrower, grantor, and beneficiary.

15 Laws of 2008, ch. 153, § 1, codified in part as RCW 61.24.010(3) and (4)(emphasis added). In
16 2009, the statute was revised again, and RCW 61.24.010(4) was rewritten to read: "(4) The
17 trustee or successor trustee has a duty of *good faith* to the borrower, beneficiary, and grantor."

18 Laws of 2009, ch. 292, § 7, codified in part as RCW 61.24.010(4)(emphasis added).

19 In *Klem v. Washington Mutual Bank*, 176 Wash.2d 771, 295 P.3d 1179 (2013), the
20 Washington Supreme Court reviewed the history of the DOTA and issued a strong statement
21 with particular reference to the duty of a trustee under that statute. Squarely at issue in the case
22 was the trustee's failure to exercise independent discretion to postpone a trustee's sale.
23 Recognizing the "tremendous power" given a trustee to sell a borrower's family home, and the
24 need to construe the DOTA in favor of borrowers "because of the relative ease with which
25 lenders can forfeit borrowers' interests," the court concluded that "[i]n a nonjudicial foreclosure,
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Below is a Memorandum Decision of the Court.

1 the trustee undertakes the role of the judge as an impartial third party who owes a duty to both
2 parties to ensure that the rights of both the beneficiary and the debtor are protected." *Id.* at 789-
3 790. "If the trustee acts only at the direction of the beneficiary, then the trustee is a mere agent
4 of the beneficiary and a deed of trust no longer embodies a three party transaction." *Id.* The
5 *Klem* court rejected the trustee's argument that "no competent Trustee would fail to respect its
6 Beneficiary's instructions not to postpone a sale without first seeking the Beneficiary's
7 permission" and held that in failing to exercise its independent judgment as to whether the sale
8 should be postponed, the trustee violated its duty to the borrowers. *Id.* at 791.⁶

9
10 Nonjudicial foreclosure in Washington is initiated by the issuance of a notice of default to
11 the borrower. Under RCW 61.24.030, the notice of default must be transmitted "by the
12 beneficiary or trustee" 30 days before the notice of sale is recorded, transmitted or served. The
13 "beneficiary" under the DOTA is the "holder of the instrument or document evidencing the
14 obligations secured by the deed of trust, excluding persons holding the same as security for a
15 different obligation." RCW 61.24.005(2).

16
17 In this case, NWTS referred to itself in the Notice of Default as the authorized agent for
18 the beneficiary even though the evidence established that it was not an authorized agent for U.S.
19 Bank. Furthermore, at the time the Notice of Default was issued, NWTS was already the
20 successor trustee under the DOTA with duties to both the Meyers and U.S. Bank. Ms. Smith
21 testified that the misreference to its role as agent was just a mistake. The appearance to the
22 Meyers, however, was that a lender they had never heard of, through an agent they had never
23 heard of, was declaring them in default under their Note and attempting to take away their home.
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26 At the time the Notice of Default was issued, NWTS was required to include additional
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29 ⁶ The court went on to hold that the trustee's failure to exercise independent judgment in continuing the trustee's
30 sale was an unfair or deceptive act or practice under the WACPA.

Below is a Memorandum Decision of the Court.

1 and specific information in the notice pursuant to RCW 61.24.030(8), which was added to the
2 DOTA effective July 26, 2009. Laws of 2009, Ch. 292, § 2. Of relevance here is the
3 requirement in subsection (l) that NWTS include in the Notice of Default "the name and address
4 of the owner of any promissory notes or other obligations secured by the deed of trust and the
5 name, address, and telephone number of a party acting as a servicer of the obligations secured by
6 the deed of trust." According to the statute, inclusion of this information is mandatory "in the
7 event the property secured by the deed of trust is residential real property."

8 At trial, NWTS successfully proved, by resort to many complicated and lengthy exhibits,
9 that as of the commencement of the foreclosure, U.S. Bank, as trustee for GEL2, was the holder
10 of the Note and that GEL2 was the owner of the Note.⁷ Despite the simple direction of the
11 statute, however, NWTS failed to include an address and phone number for either U.S. Bank or
12 GEL2. Instead, NWTS merely listed the address for the servicer, ASC, for both the beneficiary
13 and the servicer, with two different phone numbers for ASC. Accurate information identifying
14 the beneficiary and owner of the obligation is important to homeowners like the Meyers, who
15 learn for the first time in a notice of default that their mortgage obligation is owned by someone
16 with whom they never did any business or to whom they have never made any payment, because
17 they have no idea if it is real or a potential scam. In this case, the failure of NWTS to include
18 accurate information in the Notice of Default eventually caused the Meyers to hire an attorney
19 and file bankruptcy in order to verify the true owner of their home loan.

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⁷ RCW 61.24.030 refers in different places to the "beneficiary of the deed of trust," the "beneficiary" and the "owner" of the note or obligation secured by the deed of trust. The Court must assume those references are intentional. RCW 61.24.005(2) defines "beneficiary" as the "holder of the instrument or document evidencing the obligations secured by the deed of trust...." Under Article 3 of Washington's version of the Uniform Commercial Code, the "owner" and "beneficiary" of a note can be different persons. A person entitled to enforce an instrument means (i) the holder of the instrument or (ii) a nonholder in possession of the instrument who has the rights of the holder. RCW 62A.3-301. A person may be entitled to enforce a negotiable instrument even though the person is not the owner of the instrument. RCW 62A.3-301. Mr. Wiggins testified that although U.S. Bank was the holder of the Note, GEL2 was the owner of the Note.

Below is a Memorandum Decision of the Court.

1 Also by amendment in 2009, the Washington legislature added a new requirement
2 enacted as subsection (7)(a) to RCW 61.24.030 as follows:

3 (7)(a) That, for residential real property, before the notice of
4 trustee's sale is recorded, transmitted, or served, the trustee shall
5 have proof that the beneficiary is the owner of any promissory note
6 or other obligation secured by the deed of trust. A declaration by the
7 beneficiary made under the penalty of perjury stating that the
8 beneficiary is the actual holder of the promissory note or other
9 obligation secured by the deed of trust shall be sufficient proof as
10 required under this subsection.

11 (b) Unless the trustee has violated his or her duty under RCW
12 61.24.010(4), the trustee is entitled to rely on the beneficiary's
13 declaration as evidence of proof required under this subsection.

14 In this case, NWTS had a declaration from Wells Fargo, the purported attorney-in-fact for U.S.
15 Bank. Although NWTS submitted into evidence three separate powers of attorney issued by
16 U.S. Bank to Wells Fargo in 2007 which, if still in effect in 2010 when the Meyers' foreclosure
17 was commenced, would have given Wells Fargo broad powers to sign documents related to
18 foreclosures on behalf of U.S. Bank, NWTS had no notice or knowledge of any of these powers
19 of attorney or any other agreement substantiating the authority of Wells Fargo to act on behalf of
20 U.S. Bank. Further, Ms. Smith, as the foreclosing NWTS officer, was specifically trained not to
21 seek out that information. Instead, NWTS merely accepted without question the purported
22 authority of these entities.⁸

23 The Meyers argue that a trustee may not rely on a beneficiary declaration executed by
24 anyone other than the beneficiary. Further, they argue that the trustee must have proof, in the
25 words of the statute, that the beneficiary is the "owner" of the note as opposed to the holder of

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28 ⁸ The 2010 CIR listed ASC as the servicer of the Meyers' loan. Nowhere in that report, however, does it refer to
Wells Fargo as attorney in fact for U.S. Bank. Because the powers of attorney were recorded in Snohomish County,
presumably NWTS could have located them in a title search. Ms. Smith, however, testified that she did not see the
powers of attorney prior to issuing the Notice of Default. Instead, she relied on the Beneficiary Declaration and on
her knowledge that Mr. Kennerty worked for ASC/Wells Fargo.

Below is a Memorandum Decision of the Court.

1 the note. It is not necessary to address either of these arguments, however, because the Court
2 concludes that NWTS could not rely on the Beneficiary Declaration because it had no proof that
3 Wells Fargo had authority to execute that declaration on behalf of U.S. Bank.

4 In this case, NWTS also failed to comply with the requirements of RCW 61.24.030(9).
5 Under that section, before a notice of trustee's sale may be recorded, in the case of owner-
6 occupied residential real property, the beneficiary must have complied with RCW 61.24.031.
7 RCW 61.24.031(1)(a) provides that a trustee, beneficiary, or its authorized agent may not issue
8 the notice of default until 30 days after satisfying the due diligence requirements described in
9 subsection (5) if the borrower has not responded, or 90 days after contact was initiated if the
10 borrower does respond. Under RCW 61.24.031(9), the beneficiary or authorized agent must
11 prepare a "Foreclosure Loss Mitigation Form" the contents of which are set out in the statute.
12 The purpose of the foreclosure loss mitigation form is to confirm for the trustee that the due
13 diligence required under the statute has been completed as required.

16 In this case, NWTS accepted the Loss Mitigation Form from ASC signed by John
17 Kennerty. The form stated that "[t]he beneficiary, *or their authorized agent* has contacted the
18 borrower under, and has complied with, Section 2 of Chapter 292, Laws of 2009...." This is in
19 reference to the requirement of RCW 61.24.031(b) that the "beneficiary or its authorized agent"
20 contact the borrower in writing or by telephone to assess their financial ability to pay the debt
21 and to explore options for the borrower to avoid foreclosure. The statute contains specific
22 requirements for the content of the communication between the beneficiary and the borrower.
23 ASC was not the beneficiary, nor was it an authorized agent of the beneficiary. Wells Fargo was
24 an independent contractor under the Servicing Agreement, and not an authorized agent of U.S.
25 Bank. Thus, any communication by ASC to the Meyers (assuming there was some
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Below is a Memorandum Decision of the Court.

1 communication initiated by ASC; there was no evidence of same) would not have satisfied the
2 statute. Moreover, Mr. Kennerty testified in his deposition that he had no personal knowledge of
3 the statements in these declarations, and that he relied completely on his collections and
4 foreclosure departments to provide the information to him. NWTS had no evidence that ASC
5 was the authorized agent of U.S. Bank for the purpose of executing this document.
6

7 The Court concludes that NWTS failed to materially comply with its duties under the
8 DOTA. RCW 61.24.127(1)(c). Misrepresenting itself in the Notice of Default as the authorized
9 agent of U.S. Bank, NWTS declared a default under the Note, commenced a foreclosure against
10 the Residence without verifying in any way the authority of Wells Fargo or U.S. Bank to
11 maintain such foreclosure, and failed to provide the Meyers with the most basic information
12 required by statute about the current holder and owner of their loan. The Notice of Default,
13 which did not meet the requirements of the DOTA, tainted the entire foreclosure process.
14

15 **B. Violation of the Washington Consumer Protection Act.**

16 The WACPA, RCW 19.86 et seq., prohibits unfair methods of competition and unfair or
17 deceptive acts or practices in the conduct of any trade or commerce. RCW 19.86.020. The
18 Meyers base their WACPA claim on the failure of NWTS to comply with the DOTA. Because
19 NWTS's violation of the DOTA is not a *per se* violation of the WACPA under the facts of this
20 case, the Court must examine whether the Meyers have proved each element required under the
21 WACPA.¹
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23 Case law in Washington mandates that a plaintiff prove the following elements to recover
24 under the WACPA: (1) an unfair or deceptive act or practice; (2) the act or practice occurred in
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27 ¹ See RCW 61.24.135. "A *per se* unfair trade practice exists when a statute which has been declared by the
28 Legislature to constitute an unfair or deceptive act in trade or commerce has been violated." *Hangman Ridge
Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 786, 719 P.2d 531 (1986).

Below is a Memorandum Decision of the Court.

1 trade or commerce; (3) the act or practice impacts the public interest; (4) the act or practice
2 caused injury to the plaintiff in his business or property; and (5) the injury is causally linked to
3 the unfair or deceptive act. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105
4 Wash.2d 778, 780, 719 P.2d 531 (1986). To clear up any confusion about these elements, the
5 court in *Klem* held "that a claim under the Washington CPA may be predicated upon a per se
6 violation of statute, an act or practice that has the capacity to deceive substantial portions of the
7 public, or an unfair or deceptive act or practice not regulated by statute but in violation of public
8 interest." *Klem*, 176 Wash.2d at 787.

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10 The statutory definitions of "trade" and "commerce" require that the act directly or
11 indirectly affect the people of the State of Washington. The act permits any "person who is
12 injured in his or her business or property" to bring a civil suit for injunctive relief, damages,
13 attorneys' fees and costs, and treble damages. RCW 19.86.090.

14
15 **1. Unfair and Deceptive Act.**

16 After the decision of the Washington Supreme Court in *Klem v. Washington Mutual*,
17 there is no uncertainty as to how to apply the WACPA elements in a case like this one. The
18 court in *Klem* held that the practice of a trustee in a nonjudicial foreclosure deferring to the
19 lender on whether to postpone a foreclosure sale and thereby failing to exercise its independent
20 discretion as an impartial third party with duties to both parties is an unfair or deceptive act or
21 practice and satisfies the first element of the WACPA. Like the record before the court in *Klem*,
22 the record in this case supports the conclusion that NWTS abdicated its duty to act impartially
23 toward both sides. For the following reasons, the Court finds that NWTS's multiple violations of
24 the DOTA, as detailed in the preceding section, also constitute violations of the WACPA.

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26 The standard practices of NWTS ignore the importance of a foreclosure trustee's duties
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Below is a Memorandum Decision of the Court.

1 to the consumer borrower. The requirements for a notice of default under RCW 61.24.030 and
2 031 are straightforward and unambiguous. The trustee is required to provide the name and
3 address of the owner of the homeowner's loan. RCW 61.24.030(8)(l). All NWTS provided to
4 the Meyers was the address and two phone numbers for ASC. When Mr. Meyer called the phone
5 numbers, a representative of Wells Fargo answered. Counsel for NWTS argued that everyone
6 knows that ASC is a "dba" of Wells Fargo. In fact, everyone does not know that – most, if not
7 all, homeowners do not know that. Most, if not all, homeowners would be completely perplexed
8 by a reference to their home loan lender as "U.S. Bank National Association, as Trustee for
9 Structured Asset Securities Corporation, Mortgage Pass-Through Certificates, 2006-GEL2."
10 And while there is no law against maintaining a lender's name in that form, common sense
11 dictates that if a foreclosure trustee is going to put that in a notice of default, some additional
12 explanation will likely be necessary to the average homeowner. Because NWTS provided no
13 contact information for U.S. Bank as the trustee for GEL2, or for GEL2, the Meyers had no way
14 to contact either to verify the information in the Notice of Default except through the servicer
15 ASC. The statute specifically requires the Notice of Default to include contact information for
16 both the owner of the note and the servicer.
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20 The Notice of Default purports to be a formal declaration that the Meyers were in default
21 under their Note, in that it states "[t]he beneficiary *declares* you in default for failing to make
22 payments as required by your note and deed of trust." (Emphasis added). Yet, there is no
23 evidence that U.S. Bank ever declared the Meyers in default. NWTS's misrepresentation of itself
24 as the "authorized agent" of U.S. Bank made it appear that the Notice of Default did suffice as a
25 declaration of default by the beneficiary. In fact, RCW 61.24.030(8)(c), in effect at the time the
26 Notice of Default was issued, required "[a] statement that the beneficiary *has declared* the
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Below is a Memorandum Decision of the Court.

1 borrower or grantor to be in default...." (Emphasis added). The Meyers were insistent in their
2 testimony that they had not received any formal notice of default from their lender prior to their
3 receipt of the Notice of Default issued by NWTS.

4 In order to obtain contact information for their new lender, the Meyers were forced to
5 hire an attorney to prepare a Qualified Written Request for them under the Truth in Lending Act.
6 It wasn't until ASC responded to that request on January 12, 2011, six months after the
7 foreclosure was commenced, that contact information for U.S. Bank was provided, with, of
8 course, the admonition by ASC that "[a]lthough we are providing this information, the Trustee
9 will more than likely refer you back to us [ASC] to answer any questions about the loan or the
10 servicing of the loan." Ex. P-14.

11 Finally, as noted above, foreclosure against owner-occupied real property may not be
12 commenced unless the due diligence requirements of RCW 61.24.031(5) have been completed
13 by the beneficiary or an authorized agent, and unless the trustee has proof that the beneficiary is
14 the owner of the promissory note. NWTS, because of its standard policy of accepting whatever
15 is contained in a Loss Mitigation Form and Beneficiary Declaration without question, moved
16 forward with foreclosure against the Meyers' Residence without exercising any diligence of its
17 own to confirm the authority of U.S. Bank and Wells Fargo to initiate foreclosure.

18 While a foreclosure trustee is not required to be an attorney, they must be capable of
19 assembling enough information about the lender, servicer and others involved in the lending
20 chain to be able to objectively satisfy the homeowner that the correct party is initiating the action
21 to take their home. The foreclosure trustee should be able to accurately state minimal
22 information required by the DOTA to be included in the notice of default, which is, from the
23 perspective of the homeowner, the frightening first step to the loss of their home. A homeowner
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Below is a Memorandum Decision of the Court.

1 should not be required to hire an attorney to draft a Qualified Written Request under the Truth in
2 Lending Act just to get the name and address of their home loan lender. In short, NWTS must be
3 more than a typing service for the lending community. The Court therefore concludes that the
4 failures of NWTS under the DOTA in this case are both unfair and deceptive acts within the
5 meaning of the WACPA.

6 **2. Occurring in Trade or Commerce.**

7 There can be no serious question that the actions of NWTS relative to the Meyers'
8 foreclosure action and the other foreclosures handled by NWTS in the State of Washington
9 occurred in trade or commerce.

10 **3. Public Interest Impact.**

11 Whether NWTS complies with its duties under the DOTA has a significant impact on the
12 public interest. Homeowners have a right to a trustee who acts in good faith toward them in the
13 exercise of its foreclosure duties. Homeowners have a right to accurate information and conduct
14 by the trustee which complies with state law. The testimony demonstrated that NWTS, as a
15 matter of practice, accepts all information provided to it through its Vendorscape portal without
16 verification or question, without any knowledge concerning the source or accuracy of that
17 information, and without exercising any discretion relative to the interests of the borrower. Mr.
18 Meyer summed up the sentiment of the thousands of Washington homeowners who have lost
19 their homes to foreclosure in the recent economic downturn: the threat of foreclosure of his
20 family's home was the worst event of his life. The Court concludes that the Meyers have proved
21 the public interest element of their WACPA claim.

22 **4. Causation and Injury.**

23 Before a violation of the WACPA may be found, an injury to the claimant's business or
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Below is a Memorandum Decision of the Court.

1 property must be established. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105
2 Wash.2d at 792, 719 P.2d 531. The injury “need not be great” and no monetary damages need
3 be proven. *Mason v. Mortgage America, Inc.*, 114 Wash.2d 842, 854, 792 P.2d 142 (1990);
4 *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wash.App. 553, 563, 825 P.2d 714
5 (1992). Nonquantifiable injuries, such as loss of goodwill, suffice to prove injury, *Nordstrom,*
6 *Inc. v. Tampourlos*, 107 Wash.2d 735, 733 P.2d 208 (1987), but mental distress alone does not
7 establish injury. *Stephens v. Omni Ins. Co.*, 138 Wash.App. 151, 180, 159 P.3d 10
8 (Wash.Ct.App. 2007). Incurring time and money to prosecute a WACPA claim does not suffice
9 as an injury to business or property. *Sign-O-Lite*, 64 Wash.App. at 564, 825 P.2d 714. On the
10 other hand, “[c]onsulting an attorney to dispel uncertainty regarding the nature of an alleged debt
11 is distinct from consulting an attorney to institute a CPA claim.” *Panag v. Farmers Ins. Co. of*
12 *Washington*, 166 Wash.2d 27, 62, 204 P.3d 885 (2009). As for damages, as opposed to injury,
13 the court in *Mason* stated:

16 [W]hether an “injury” has been sustained so as to support an award
17 of attorneys’ fees and costs under the Consumer Protection Act is a
18 different inquiry than whether treble damages are appropriately
19 awarded. An injury cognizable under the Act will sustain an award
20 of attorneys’ fees while treble damages are based upon “actual”
21 damages awarded.

22 *Mason*, 114 Wash.2d at 855, 792 P.2d 142. Finally, on causation, the Washington Supreme
23 Court instructs that “[i]f investigative expense would have been incurred regardless of whether a
24 violation existed, causation cannot be established.” *Panag*, 166 Wash.2d at 64, 204 P.3d 885.

25 In this case, NWTS had a simple task: provide the Meyers with an address and telephone
26 number for the owner of the Note and exercise independent judgment to confirm the authority of
27 the entities requesting foreclosure of the Residence. But for the failure of NWTS to provide that
28 information in the Notice of Default as required by the DOTA and to exercise independent

Below is a Memorandum Decision of the Court.

1 judgment, the Meyers would not have been forced to incur the expense of retaining Mr. Jones to
2 pursue additional information concerning their loan and Mr. Feinstein to file a bankruptcy
3 proceeding in order to stop a foreclosure which was improperly instituted as to their Residence.

4 **5. Damages.**

5 Under the WACPA, the Meyers are entitled to actual damages, together with the costs of
6 suit, including a reasonable attorney's fee. RCW 19.86.090. The Court may increase the award
7 to three times the amount of actual damages, provided the award does not exceed \$25,000.

8 Because the Notice of Default issued by NWTS was completely defective, the Meyers are
9 entitled to all of the damages they suffered which flowed from the unlawful foreclosure activities
10 of NWTS. In short, they should not have been displaced from their home based upon the Notice
11 of Default. As detailed in the facts above, those damages total \$23,504. The Court further finds
12 that trebling under RCW 19.86.090 is also warranted up to the statutory maximum of \$25,000.
13 The Meyers are also entitled to seek recovery of the costs of this suit, including a reasonable
14 attorney's fee.

15 **C. Fair Debt Collection Practices Act.**

16 The Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p ("FDCPA") was
17 enacted "to protect consumers from a host of unfair, harassing, and deceptive collection
18 practices without imposing unnecessary restrictions on ethical debt collectors." *FTC v. Check*
19 *Investors, Inc.*, 502 F.3d 159, 165 (3rd Cir. 2007) *cert. denied Check Investors, Inc. V. F.T.C.*,
20 555 U.S. 1011, 129 S.Ct. 569, 172 L. Ed. 429 (2008)(quoting *Staub v. Harris*, 626 F.2d 275,
21 276-77 (3rd Cir. 1980) (internal quotations omitted)). Under the act, a debt collector may not
22 use unfair or unconscionable means to collect or attempt to collect any debt (15 U.S.C. §1692f),
23 nor may a debt collector use any "false, deceptive, or misleading representation or means in
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Below is a Memorandum Decision of the Court.

connection with the collection of any debt" (15 U.S.C. §1692e). In *Walker*, *supra*, the Washington appellate court addressed the potential liability of foreclosure trustees under these two sections and discussed developing federal law on the issues, concluding that as long as a trustee confines itself to actions necessary to effectuate a foreclosure, its liability will be solely under Section 1692f rather than Section 1692e. 308 P.3d at 725-26.⁹

In analyzing liability under Section 1692, *Walker* relied on *McDonald v. OneWest Bank*, 2012 WL 555147 (W.D. Wash. Feb. 21, 2012). In *McDonald*, the court noted the current trend among federal district courts in the Ninth Circuit to limit a trustee's liability to Section 1692f if they confine their activities to foreclosure, citing *Jara v. Aurora Loan Services, LLC*, 2011 WL 6217308, at * 5 (N.D.Cal. Dec.14, 2011); *Pizan v. HSBC Bank USA, N.A.*, 2011 WL 2531104, at *3 (W.D.Wash. June 23, 2011) ; *Lettenmaier v. Fed. Home Loan Mortg. Corp.*, 2011 WL 1938166, at *11-12 (D.Or. May 20, 2011); *Armacost v. HSBC Bank USA*, 2011 WL 825151, at *5-6 (D. Idaho Feb. 9, 2011); *Long v. Nat'l Default Servicing Corp.*, 2010 WL 3199933 at *4 (D. Nev. Aug. 11, 2010). In the absence of any Ninth Circuit law, the Court sees no reason to depart from this trend.

In this case, there is no evidence that NWTS took any action other than that which was necessary to effectuate a nonjudicial foreclosure against the Residence. Accordingly, NWTS could be liable only under Section 1692f if it commenced the foreclosure against the Residence when (A) there was no present right to possession of the property claimed as collateral through an enforceable security interest; (B) there was no present intention to take possession of the property; or (C) the property was exempt by law from such dispossess or disablement. 15 U.S.C. § 1692f(6). In *Walker*, the court noted that the trustee there could be liable under Section

⁹ For purposes of Section 1692f(6), a "debt collector" includes a "person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests." 15 U.S.C. § 1692a(6).

Below is a Memorandum Decision of the Court.

1692f(6)(A) if it commenced foreclosure without a valid appointment as trustee. 308 P.3d 716,
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726. In this case, however, NWTS had been appointed successor trustee when it issued the
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Notice of Default, and it proved at trial that U.S. Bank was the holder of the Note with a right to
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foreclose against the Residence. Accordingly, the Court finds there was a present right of
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possession of the property through an enforceable security interest, although the procedure
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initiating the enforcement of that security interest was defective. Accordingly, the Court finds
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that the Meyers have failed to prove entitlement to relief under the FDCPA.
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CONCLUSION

10 For the foregoing reasons, the Court finds in favor of the Meyers in the amount of
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\$48,504, consisting of actual damages of \$23,504, plus treble damages under the WACPA of
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\$25,000. The Meyers may request costs of suit and a reasonable attorney's fee under the
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WACPA by separate motion and submit an order and judgment in conformance with this
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Memorandum Decision.
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17 //END OF MEMORANDUM DECISION//
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